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IN THE

Supreme Court of the United States

October Term, 1982

PEOPLE OF THE STATE OF MICHIGAN
on relation of WILLIAM L. FISHER,
Appellant,
v.
ROBERT C. ANDERSON,
Appellee.

On Appeal from the Michigan Supreme Court

MOTION TO DISMISS AND BRIEF IN SUPPORT

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MOTION TO DISMISS

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Now comes Appellee, Robert C. Anderson, Judge for the Sixth Judicial Circuit of the State of Michigan, located in the County of Oakland, State of Michigan, and respectfully moves this Honorable Court, pursuant to Rule 16(1)(b) of the Rules of the United States Supreme Court, to Dismiss the Appeal filed in this cause and to

Affirm the Decision of the Supreme Court of the State of Michigan. Appellant, in support of his Motion, sets forth the reasons below.

Appellant, William L. Fisher, challenges MICH. CONST. 1963, art. VI, § 19, which prohibits election or appointment to a judicial office after reaching the age of seventy (70) years, on the basis that this provision constitutes age discrimination and is hence a violation of William J. Beer's, former Judge of the Sixth Circuit for the State of Michigan, constitutional rights as protected by MICH. CONST. 1963, art. I, § 2, and U.S. CONST. amend. XIV. The Michigan Court of Appeals and the Michigan Supreme Court denied Appellant's challenge.

The issues raised in this Appeal do not present a substantial federal question as this Court has recently spoken on the issue of mandatory retirement as it relates to age discrimination in the cases of *Massachusetts v. Murgia*, 427 U.S. 307, 96 S. Ct. 2562 (1976) and *Vance v. Bradley*, 440 U.S. 93, 99 S. Ct. 939 (1979).

The issues raised in this Appeal do not present a substantial federal question as this controversy was previously presented to this Court: *Beer v. Austin*, 449 U.S. 802, 101 S. Ct. 46 (1980), which was dismissed for want of a federal question on October 6, 1980. The prohibition of William J. Beer to seek re-election to the position of Judge of the Sixth Judicial Circuit of Michigan, due to MICH. CONST. 1963, art. VI, § 19, was challenged in both *Beer v. Austin*, and the case now before this Court. The legal issues are identical in both cases.

WHEREFORE, Appellee, Robert C. Anderson, prays this Honorable Court Dismiss this Appeal for want of a substantial federal question and Affirm the Decisions of the Michigan Supreme Court and the Michigan Court of Appeals.

Respectfully submitted,

Oakland County Civil Counsel

By: Linda E. Wasielewski, Assistant
1200 North Telegraph Road
Pontiac, Michigan 48053
Attorney for
Robert C. Anderson, Appellee

ISSUE PRESENTED

THE INSTANT APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION, AS THE ISSUE OF MANDATORY RETIREMENT AS IT RELATES TO AGE DISCRIMINATION HAS BEEN PREVIOUSLY DECIDED BY THIS COURT.

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On Appeal from the Michigan Supreme Court

BRIEF IN SUPPORT OF MOTION TO DISMISS

STATEMENT OF FACTS

William J. Beer filed his Affidavit of Candidacy for re-election to the Sixth Judicial Circuit Court of the State of Michigan in and for the County of Oakland on or about March 17, 1980. The Affidavit was rejected by the Director of the Michigan State Board of Elections on March 20, 1980, as Beer was over the constitutionally set age limit of 70 years.

Beer challenged the constitutionality of MICH. CONST. 1963, art. VI, § 19, in a Complaint for Mandamus filed April 1, 1980, in the Court of Appeals. (*Beer v. Austin*, Docket No. 50818) The Complaint was dismissed on May 29, 1980, as lacking merit. (A. 1). Leave to Appeal was filed in the Michigan Supreme Court. (*Beer v. Austin*, Docket No. 65259) Leave to Appeal was denied by the Michigan Supreme Court on June 19, 1980, (A. 2). The United States Supreme Court dismissed the Appeal filed therein on October 6, 1980, for want of federal question, *Beer v. Austin*, 449 U.S 802, 101 S. Ct. 46 (1980). As a result, thereof, Beer's name did not appear on the primary election or general election ballots. His term of office expired on January 1, 1981.

Judge Robert C. Anderson successfully ran in the primary (August, 1980) and general (November, 1980) elections. He was qualified and assumed office on January 1, 1981, as Beer's successor to the vacant judicial seat.

Appellant filed the instant cause in the Michigan Court of Appeals on January 23, 1981, asserting that Beer holds over in his judicial office and that Judge Anderson usurps said judicial office. Appellant's Application for Quo Warranto was denied for lack of merit by the Michigan Court of Appeals in an Order dated April 21, 1981, (A. 3).

On May 12, 1981, Appellant filed a motion for Rehearing and/or Reconsideration before the Michigan Court of Appeals. Said Motion was denied on June 3, 1981, (A. 4). Appellant filed an Application for Leave to Appeal to the Michigan Supreme Court on June 10, 1981. Leave to Appeal was denied by the Michigan Supreme Court on February 5, 1982, (A. 5).

On May 2, 1982, Appellant filed Notice of Appeal with this Honorable Court. To Appellant's Appeal, Appellee, Robert C. Anderson, herein responds.

ARGUMENT

Appellee prays for entry of an Order of Dismissal of this Appeal and an Order Affirming the Orders entered below by the Michigan Court of Appeals and the Michigan Supreme Court pursuant to Rule 13(1)(b) of the Court. The matter presented herein does not present a substantial federal question as the issue of mandatory retirement as it relates to age discrimination has been decided by this Court, both generally and as it relates to William J. Beer.

William J. Beer filed his Affidavit of Candidacy for re-election to the Circuit Court for the County of Oakland on or about March 17, 1980. The Affidavit was rejected on March 20, 1980, by the Director of the State Board of Election as Beer was over the constitutionally set age limit.

MICH. CONST. 1963, art. VI, § 19, provides in relevant part:

> "No person shall be elected or appointed to a judicial office after reaching the age of 70 years."

Beer challenged the constitutionality of this provision in a Complaint for Mandamus filed in the Michigan Court of Appeals on or about April 1, 1980; *Beer, et al. v. Austin, et al.*, Docket No. 50818.

The two legal bases upon which the challenged relied were:

> (1) That MICH. CONST. 1963, art. VI, § 19, violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution by creating an irrebuttable presumption of unfitness for judicial office.

(2) That MICH. CONST. 1963, art. VI, § 19, is in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The case law in this area is clear. The irrebuttable presumption theory has been rejected in cases dealing with mandatory retirement. *Malmed, et al v. Thornburgh, et al.*, 478 F Supp 998, 621 F2d 998, (1980); *Massachusetts v. Murgia*, 427 U.S. 307, 96 S. Ct. 2562 (1976); *Vance v. Bradley*, 440 U.S. 93, 99 S. Ct. 939 (1979); *Trafelet v. Thompson*, 594 F2d 623 (7th Cir 1979); *Rubino v. Ghezzi*, 512 F2d 431 (2nd Cir 1975).

With respect to the Equal Protection argument, it has been held that age is not a suspect class and that the right to employment is not fundamental. *Trafelet v. Thompson*, 594 F2d 623. Therefore, such a challenge is weighed by the "rational basis test"; to-wit, if the state can show a rational basis for the law it is not violative of the Equal Protection Clause of the federal constitution. Mandatory retirement provisions have withstood this limited scrutiny. *Massachusetts v. Murgia*, 427 U.S. 307; *Vance v. Bradley*, 440 U.S. 93.

The provision in question, MICH. CONST. 1963, art. VI, § 19, thus being unchallengable along federal constitutional bases, Beer's Complaint for Mandamus was dismissed on May 29, 1980, by the Michigan Court of Appeals as lacking in merit, (A. 1).

That decision was next submitted to the Michigan Supreme Court (Docket No. 65259) which denied Leave to Appeal on June 19, 1980, (A. 2).

Finally, this issue was submitted to the United States Supreme Court, which dismissed the Appeal for want of a federal question, on October 6, 1980. *Beer v. Austin*, 449 U.S. 802, 101 S. Ct. 46 (1980).

The decisions in *Beer v. Austin*, are dispositive as to the case at bar. Beer's Affidavit of Candidacy was rightfully rejected pursuant to MICH. CONST. 1963, art. VI, § 19, which stands as constitutional. Beer's name did not, therefore, appear on the primary or general election ballot, and as a result, his term of office expired on January 1, 1981.

Appellee herein, Robert C. Anderson, successfully ran for the vacant judicial seat in the primary election in August of 1980, and the general election of November, 1980. He was duly qualified and assumed office on January 1, 1981, as Beer's successor.

Appellant, William L. Fisher, subsequently filed an Action for Quo Warranto alleging *inter alia* that William J. Beer holds over his judicial office and that Appellee, Robert C. Anderson, usurps said judicial office and pretends to hold the same.

MICH. CONST. 1963, art. VI, § 12, states in relevant part:

> "Circuit Court judges shall be nominated and elected at non-partisan elections in the circuit in which they reside, and shall hold office for a term of six years and until their successors are elected and qualified . . ."

As is emphasized above, Beer filed his Affidavit, which was properly rejected pursuant to MICH. CONST.

1963, art. VI, § 19. His name did not appear upon either the primary election or general election ballots. His term was completed on January 1, 1981.

Judge Anderson was elected and qualified and assumed office on January 1, 1981, pursuant to MICH. CONST. 1963, art. VI, § 12. He rightfully holds his position of Oakland County Circuit Court Judge until January 1, 1987.

As Judge Anderson rightfully holds his judicial office and does not usurp the same, the Michigan Court of Appeals and the Michigan Supreme Court rightfully dismissed Appellant's cause of action. As William J. Beer previously litigated this issue, it cannot be said that he was not granted his day in court.

The question having been previously raised and determined, this case does not present a substantial federal question in need of review.

CONCLUSION

The Appeal should be Dismissed as lacking a substantial federal question, and the decisions of the Michigan Court of Appeals and the Michigan Supreme Court should be Affirmed.

Respectfully submitted,

OAKLAND COUNTY CIVIL COUNSEL

By: Linda E. Wasielewski, Assistant
1200 North Telegraph Road
Pontiac, Michigan 48053
Attorney for,
Robert C. Anderson, Appellee

ORDER

(State of Michigan — Court of Appeals)
(May 9, 1980)

(The Honorable William John Beer, Thomas Plunkett, Barry Yaker, Frances R. Avadenka, and Warren Newton, Plaintiffs, v Secretary of State of the State of Michigan, Oakland County Board of Election Comisssioners and Members thereof, Michigan State Board of Canvassers, its Secretary and Members thereof, Oakland County Board of Canvassers and Members thereof, and Director, Board of Elections, Defendants. No. 50818)

At A Session Of The Court Of Appeals Of The State Of Michigan, Held at the Court of Appeals in the City of Grand Rapids, on the thirtieth day of April in the year of our Lord one thousand nine hundred and eighty.

Present the Honorable Daniel F. Walsh, Presiding Judge. Robert B. Burns, Donald E. Holbrook, Jr., Judges.

In this cause a complaint for mandamus and motion for order to show cause are filed by plaintiffs, and an answer in opposition thereto together with a motion for extension of time in which to file brief and a motion for immediate consideration of the motion for extension of time having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the motion for order to show cause be, and the same is hereby DENIED for lack of merit in the grounds presented.

IT IS FURTHER ORDERED that the complaint for mandamus be, and the same is hereby DISMISSED.

IT IS FURTHER ORDERED that the motion for extension of time in which to file brief and motion for immediate consideration of the motion for extension of time be, and the same are hereby DENIED as moot.

(Certification omitted)

ORDER

(State of Michigan — Supreme Court)

(June 19, 1980)

(The Honorable William John Beer, *et al.*, Plaintiffs-Appellants, v Secretary of State of the State of Michigan, *et al.*, Defendants-Appellees. SC: 65259)

At A Session Of The Supreme Court Of The State Of Michigan, Held at the Supreme Court Room, in the City of Lansing, on the 19th day of June in the year of our Lord one thousand nine hundred and eighty.

Present the Honorable Mary S. Coleman, Chief Justice, Thomas Giles Kavanagh, G. Mennen Williams, Charles L. Levin, John W. Fitzgerald, James L. Ryan, Blair Moody, Jr., Associate Justices.

On order of the Court, the plaintiffs-appellants' motion for immediate consideration is considered, and it is GRANTED.

The application for leave to appeal is also considered, and it is DENIED, becausee the Court is not persuaded that the questions presented should be reviewed by this Court.

Kavanagh, and Moody, JJ., would grant leave to appeal.

Williams, J., not participating.

(Certification omitted)

ORDER

(State of Michian — Court of Appeals)

(April 28, 1981)

(William L. Fisher, Plaintiff, v Oakland Circuit Judge, Defendant. No. 55826)

At A Session Of The Court Of Appeals Of The State Of Michigan, Held at the Court of Appeals in the City of Lansing, on the twenty first day of April in the year of our Lord one thousand nine hundred and eighty one.

Present the Honorable Daniel F. Walsh, Presiding Judge, Robert B. Burns, Donald E. Holbrook, Jr., Judges.

In this cause an application for leave to bring an action in the nature of quo warranto, pursuant to GCR 1963, 715.2(4) and 715.1(1), is filed by plaintiff, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the application be, and the same is hereby DENIED for lack of merit in the grounds presented. Defendant may recover costs pursuant to GCR 1963, 822.

(Certification omitted)

ORDER

(State of Michigan — Court of Appeals)

(June 4, 1981)

William L. Fisher, Plaintiff, v Oakland Circuit Judge, Defendant. No. 55826)

At A Session Of The Court Of Appeals Of The State Of Michigan, Held at the Court of Appeals in the City of Grand Rapids, on the third day of June in the year of our Lord one thousand nine hundred and eighty one.

Present the Honorable Daniel F. Walsh, Presiding Judge, Robert B. Burns, Donald E. Holbrook, Jr., Judges.

In this cause an application for rehearing is filed by plaintiff, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the application for rehearing be, and the same is hereby DENIED.

(Certification omitted)

ORDER

(State of Michigan — Supreme Court)
(February 5, 1982)

William L. Fisher, Plaintiff-Appellant, v Oakland Circuit Judge, Defendant-Appellee. SC: 67402)

At A Session Of The Supreme Court Of The State Of Michigan, Held at the Supreme Court Room, in the City of Lansing, on the 5th day of February in the year of our Lord one thousand nine hundred and eighty two.

Present the Honorable Mary S. Coleman Chief Justice, Thomas Giles Kavanagh, G. Mennen Williams, Charles L. Levin, John W. Fitzgerald, James L. Ryan, Blair Moody, Jr., Associate Justices.

On order of the Court, the application *in propria persona* for leave to appeal is considered, and it is DENIED, because the Court is not persuaded that the question presented should be reviewed by this Court.

(Certification omitted)